

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 13 2003

CATHY A. CATTERSON

U.S. COURT OF APPEALS

LESTER RUSSELL MCKEE,

Plaintiff-Appellant,

v.

JO ANNE B. BARNHART, Commissioner
of the Social Security Administration,

Defendant-Appellee.

No. 02-35078

D.C. No. CV-00-03095-FR

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge, Presiding

Submitted May 8, 2003**
Portland, Oregon

Before: LAY,*** WALLACE, and TALLMAN, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

*** The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

Lester McKee appeals the district court's decision affirming the Commissioner of Social Security's denial of his application for disability benefits under the Social Security Act. McKee argues the record does not support the Commissioner's finding that McKee could perform his past relevant work.

"We review de novo the district court's order affirming the Commissioner's denial of benefits." Morgan v. Comm'r of the Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999). The Commissioner's decision will be upheld so long as it is supported by substantial evidence on the record as a whole and not based on legal error. Id. Substantial evidence refers to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).

In reviewing the record as a whole, we hold it provides substantial evidence to support the Commissioner's findings. Five different doctors produced evidence indicating that McKee made an excellent recovery from his heart surgery and has few remaining limitations. Dr. Burwell, for instance, stated in a report that he believed McKee could return to his former job as a gas station attendant. Similarly, Dr. Ermshar, along with three other doctors, stated that McKee had only minimal impairments. With this evidence, the Commissioner reasonably

concluded that McKee could perform his past work. The Commissioner thus properly denied McKee's request for benefits as a supervisor.

Judgment AFFIRMED.